

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

STEVEN S. BROWN,

Plaintiff,

v.

**Case No. 07-cv-13
Judge Gregory L. Frost**

WARDEN VOORHIES, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on two motions filed by Plaintiff Steven S. Brown regarding his opposition to the Motion For Summary Judgment (ECF No. 275) filed by Defendants. On January 17, 2012, Plaintiff moved this Court for an order deferring consideration of the Defendants' Motion pursuant to Fed. R. Civ. P. 56(d). (ECF No. 286.) The following day, Plaintiff also filed a Motion to Expand Time to Respond to Summary Judgment. (ECF No. 288.)

For the reasons that follow, this Court **DENIES** the motion to defer consideration of Defendants' Motion for Summary Judgment under Rule 56(d), but **GRANTS** the Plaintiff's motion for an extension of time in which to respond to the Motion.

I. Background Relevant to Plaintiff's Motions

Defendants filed their Motion for Summary Judgment on November 30, 2011. (ECF No. 275.) On Plaintiff's Motion, this Court extended the time for Plaintiff's response to the summary judgment motion, setting a deadline of January 16, 2012 for Plaintiff's opposition. (ECF No. 279.) Expressing concern that prison regulations may have prohibited the Court (and

Plaintiff) from having access to relevant evidence in this case, this Court also ordered Defendants and non-party Ohio Department of Rehabilitation and Correction (ODRC) to file with the Court certain DVDs that were returned to the prison from Plaintiff's previous legal counsel and further prohibited the destruction of Plaintiff's legal documents pending disposition of this action (ECF No. 283.)

In accordance with the Court's Order, the ODRC provided the Court with 43 DVD/CD disks and five VHS videotapes. The Court distributed copies of these DVDs/CDs and videotapes to Plaintiff on January 18, 2012. (ECF No. 289.) In addition, in his motion for an extension of time, Plaintiff acknowledges receipt of "2 tubs of his legal papers" from the Warden on January 12, 2012 (albeit in disarray). (ECF No. 288, at 1-2.)

II. Discussion

Fed. R. Civ. P. 56(d) allows the Court to defer considering a motion for summary judgment when the nonmoving party has shown by affidavit that he "cannot present facts essential to justify [his] opposition." Plaintiff has invoked Rule 56(d), citing the Defendants' purported failure to comply with this Court's Order to return his "legal papers" to him. (ECF No. 286, at 4.) Plaintiff's affidavit to support his Rule 56(d) motion states that the prison had not returned "legal papers" that were necessary for him to provide evidence in opposition to the Defendants' Motion for Summary Judgment. (*Id.* at 7.)

The Court declines to defer consideration of the Defendants' Motion for Summary Judgment. Since Plaintiff executed his affidavit in support of his Rule 56(d) motion, circumstances surrounding Plaintiff's "legal papers" appear to have changed. This Court notes that Defendants did, in fact, comply with this Court's Order (ECF No. 283) to file with the Court

certain DVDs that were among Plaintiff's legal documents returned to the prison by Plaintiff's prior legal counsel. ODRC provided 43 DVDs/CDs and five VHS videotapes in response to the Court's Order. The Court sent copies of these materials to Plaintiff on January 18, 2012 and retained the originals it received from the ODRC. (ECF No. 289.) This Court has no facts before it to suggest that Defendants and OCRC have failed to fully comply with its Order.

In addition, Plaintiff says in his Motion To Expand Time that the Warden has returned to him two tubs of legal papers. (ECF No. 288 at 1, 3.) This Court infers that Plaintiff received these materials *after* Plaintiff executed his Rule 56(d) affidavit in support of his motion to defer consideration of Defendants' summary-judgment motion.¹ With these materials in his possession, as well as the DVDs/CDs and videotapes the Court has transmitted to Plaintiff, this Court cannot say that Plaintiff is unable to present facts to rebut the Defendants' Motion for Summary Judgment. Accordingly, this Court **DENIES** Plaintiff's Rule 56(d) motion for the Court to defer consideration of the Defendants' Motion.

The Plaintiff's Motion to Expand Time (ECF No. 288), however, is well-taken. Because the DVDs/CDs and VHS videotapes requested by Plaintiff were not transmitted to him until January 18, 2012, coupled with Plaintiff's contention that he received additional relevant "legal papers" from the Warden on January 12, 2012, this Court finds sufficient cause to justify granting Plaintiff an extension of time in which to respond to the Defendants' Motion for Summary Judgment. Accordingly, Plaintiff's Motion to Expand Time is **GRANTED**. The

¹Plaintiff's Rule 56(d) affidavit states that Plaintiff executed it on the "12th day of January, 2011 [sic]." (The Court recognizes that "2011" is likely a typographical error.) In the Motion to Expand Time, Plaintiff notes that he received the "two tubs" of legal documents on January 12, 2012. (ECF No. 288, at 1.) In his "Sworn Statement" appended to the motion, Plaintiff says he received the tubs on January 13, 2012. (*Id.* at 3.)

deadline for filing Plaintiff's memorandum in opposition to the Defendants' Motion for Summary Judgment is extended to February 13, 2012.

III. Conclusion

For the reasons set forth above, Plaintiff's Motion to Defer Consideration of Defendant's Motion for Summary Judgment (ECF No. 286) is **DENIED**. Plaintiff's Motion To Expand Time to Respond to Summary Judgment (ECF No. 288), however, is **GRANTED**. The Court establishes the following briefing schedule:

1. Plaintiff's memorandum in opposition to Defendants' Motion for Summary Judgment shall be filed on or before February 13, 2012.
2. Defendants' reply brief in support of summary judgment shall be filed on or before March 1, 2012.
3. The non-oral hearing on Defendants' Motion for Summary Judgment is rescheduled to March 2, 2012.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE